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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

ONSE NOT PRINTED

No. 1646

ROGER B. COPINGER, WARDEN
MARYLAND STATE PENITENTIARY,

Petitioner,

v.

EARL LEROY BLACKBURN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ONSE NOT PRINTED

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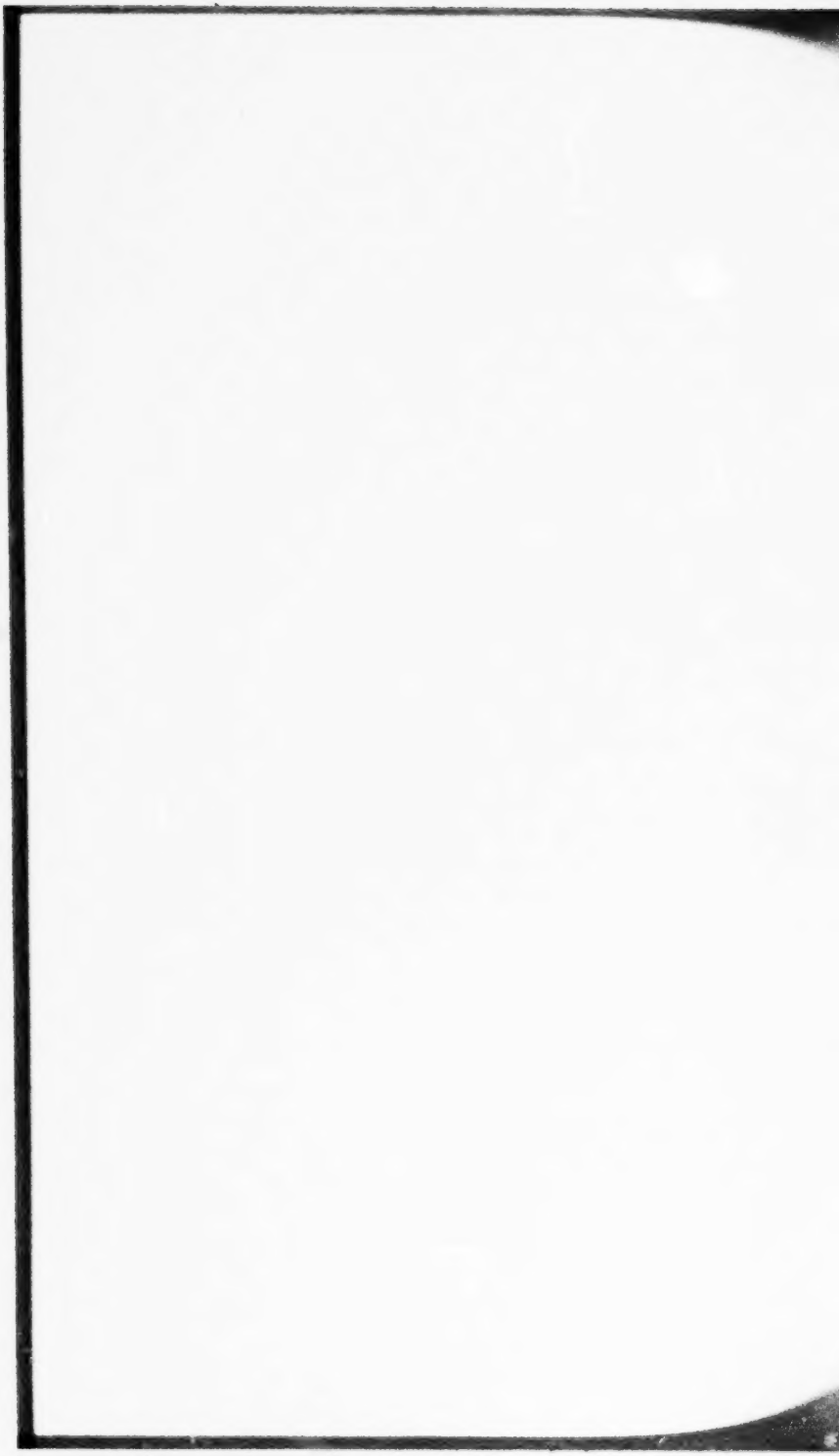

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Table of Contents

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	9
Conclusion	17
Appendix:	
Opinion of the Circuit Court of Appeals	1a

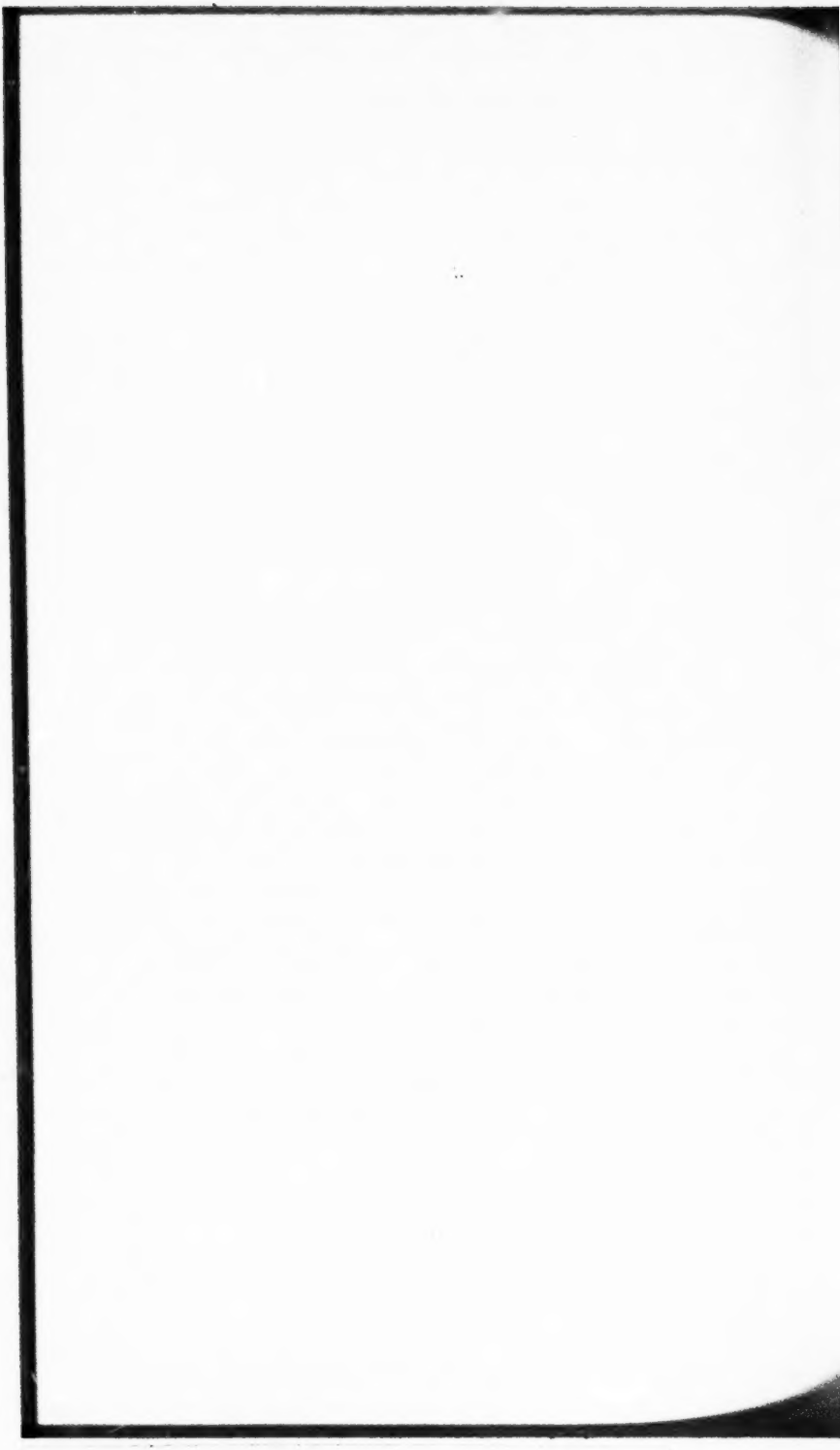
Table of Citations

Cases

Blackburn v. Maryland, 380 U.S. 937 (1965)	3
Clewis v. Texas, 386 U.S. 707 (1967)	11
Collins v. Beto, 348 F. 2d 823 (5th Cir., 1965)	11
Culombe v. Connecticut, 367 U.S. 568 (1964)	11
Davis v. North Carolina, 384 U.S. 737 (1966)	11
DeToro v. Pepersack, 332 F. 2d 341 (4th Cir., 1964), cert. den. 379 U.S. 909 (1964)	13
Frazier v. Cupp. 394 U.S. 731 (1969)	14, 15
Greenwald v. Wisconsin, 390 U.S. 519 (1968)	14
Jacobs v. Warden, 367 F. 2d 321 (4th Cir., 1966)	11
Mallory v. United States, 354 U.S. 449 (1957)	11
McNabb v. United States, 318 U.S. 332 (1943)	11
Mefford and Blackburn v. State, 235 Md. 497 (1964)	3, 12
Outing v. North Carolina, 383 F. 2d 892 (1967), cert. den. 390 U.S. 997 (1968)	11
Ralph v. Pepersack, 335 F. 2d 128 (4th Cir., 1964), cert. den. 380 U.S. 925 (1965)	11
United States v. Schwartz, 372 F. 2d 678 (4th Cir., 1967)	11
White v. Maryland, 373 U.S. 59 (1963)	13

Statutes

Constitution of the United States:	
Amendment XIV, Section 1	2, 8, 9



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IN THE

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OCTOBER TERM, 1969

No. ------

ROGER B. COPINGER, WARDEN
MARYLAND STATE PENITENTIARY,
Petitioner,

v.

EARL LEROY BLACKBURN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Roger B. Copinger, Warden, Maryland State Penitentiary, by Francis B. Burch, Attorney General of Maryland, and Alfred J. O'Ferrall, III, Assistant Attorney General of Maryland, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on February 20, 1970.

CITATIONS TO OPINIONS BELOW

The Opinion of the Circuit Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pages 1a to 2a.

The Opinion of the District Court for the District of Maryland is reported at 300 F. Supp. 1127 (D.C. Md., 1969).

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on February 20, 1970. See Appendix A, *infra*, pages 1a to 2a. This Petition for Certiorari will read: was timely filed with an extension from aforesaid date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the action of the Circuit Court of Appeals for the Fourth Circuit in affirming the District Court below was correct, where the District Court's conclusion that under the totality of the circumstances, Blackburn's incriminating statements were not the product of his free will and rational choice, and were given involuntarily, was obviously improper and based upon erroneous standards of the law.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States

Amendment XIV, Section 1:

"All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Appellee, Earl Leroy Blackburn, was convicted in the Circuit Court for Harford County in a non-jury trial by two judges (Chief Judge Stewart Day and Judge Edwin Harlan) of murder in the first degree. Judgment was af-

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firmed on appeal by the Court of Appeals of Maryland in *Mefford and Blackburn v. State*, 235 Md. 497 (1964). Blackburn's Petition for Writ of Certiorari was denied by the Supreme Court. *Blackburn v. Maryland*, 380 U.S. 937 (1965).

Blackburn thereafter petitioned the United States District Court for the District of Maryland for federal habeas corpus relief, contending that his confession was the product of an overborne will obtained in violation of his right to counsel, in violation of his right to be advised of his constitutional rights, under collusive circumstances, and during a period when he was illegally deprived of due process of law. Counsel for Petitioner and Respondent agreed that the record of the case, as contained in the Joint Record Extract filed in the Court of Appeals of Maryland in Blackburn's original appeal, was fully adequate for the legal determination of the issues involved and elected not to produce any additional evidence in the District Court. Thereafter, proceeding on the record before him without evidentiary hearing, the District Judge, Frank A. Kaufman, granted relief. 300 F. Supp. at 1144.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed, in a *per curiam* decision, the Order granting the writ of habeas corpus by Judge Kaufman, for the reasons stated by Judge Kaufman in his Opinion. See Appendix A, page 1a. The facts relevant to the question presented by this Petition are for the most part uncontroverted, and are essentially undisputed, but because of the misapplication of these facts they are set forth fully as follows:

In the early morning hours of March 4, 1962, the lone attendant of a gasoline station in Harford County was robbed at gunpoint by two men of approximately $103.00

of the station owner's money, and was shot by one of the two men during the course of the robbery. The victim made his way to an adjacent restaurant and told an employee there that he had been robbed and shot. He also told the employee that the two men had ordered him to face the wall and count to fifty and then had shot him. The victim died a few hours after the crime as a direct result of the gunshot wound.

In investigating the crime, the Maryland State Police received information that a 1955 or 1956 red Chevrolet had been seen in the vicinity of the gas station on the night of the crime with its two male occupants surveying other gasoline stations. The Maryland State Police cooperated with Baltimore County Police after a gasoline station in Baltimore County, in the general area, was robbed on April 16, 1962, by men who used the techniques used in the Harford County robbery. As a result of the joint investigation, Frederick Morris Mefford was first arrested by the Baltimore County Police and was later arrested by the Maryland State Police on April 23, 1962. The Maryland State Police determined that Mefford owned a 1955 red Chevrolet similar to that seen on the night of the robbery and murder, and Mefford turned over to the police a pistol used in the robbery and murder.

Mefford confessed to the Maryland State Police in the late evening of April 23, 1962, implicating Blackburn, and showed the police where Blackburn lived. As a result of Mefford's confession implicating Blackburn, which was corroborated by the facts that Mefford owned a 1955 red Chevrolet and that Mefford turned over the murder weapon to the police, the Maryland State Police and the Baltimore County Police, at 3:00 a.m. on April 24, 1962, arrested Blackburn.

Blackburn was taken to police headquarters in Baltimore County and interrogated for an hour and then put in a cell until 8:30 a.m., when he was fingerprinted.

Blackburn testified that at Baltimore County he asked police to book him and then let him have a telephone call to call counsel. The police testified that Blackburn never asked that he be allowed to make a telephone call and that he did indicate that after he was booked, he would then call a lawyer.

At about 3:00 p.m., Blackburn was taken to the State Police Barracks in Harford County.

After arrival in Harford County at 4:00 p.m., Blackburn was questioned for a few minutes by Lieutenant Hanley and indicated that he again said that the police should book him if they had evidence to do so and then let him have counsel. Blackburn further indicated that Hanley told him he would not be released until the police had gotten what they were looking for. However, Blackburn's recollection of what Hanley told him was completely different from that of Trooper Wellman, who testified that Hanley urged Blackburn to talk after telling him that they would promise him nothing, and after advising him of his right either to talk or, without prejudice, to remain silent, and that Blackburn said that he knew his rights.

Blackburn testified on the question of voluntariness of the confession subsequent to the testimony of Trooper Wellman and did not dispute the testimony of Trooper Wellman. Blackburn admits that he discussed the taking of a lie detector test with Hanley and that he agreed to take one if he could have twenty-four hours' rest, a bed with a mattress, and three good meals. Hanley agreed to these conditions. At 4:15 p.m. Blackburn was placed in a cell.

An hour after the interrogation, a trooper ascertained from Blackburn where to reach Blackburn's wife in order to gain access into Blackburn's apartment to get his clothing. Blackburn told the trooper what clothing he wanted and where to locate his wife, and two hours later the trooper returned with the requested clothing. At 7:45 p.m., after receiving the clothes he requested, Blackburn was taken to another barracks where the lie detector expert was stationed. He was immediately placed in a cell and was not questioned that evening.

Although Blackburn says that while he was in custody he was fed only sandwiches and milk, and regurgitated what he ate and drank, all of the police officers testified that he was given full meals at the proper hours and apparently both ate and retained them. Blackburn often quibbled on the stand as to matters on which he had heard testimony from the police officers. Blackburn admitted in his testimony that he was allowed to rest in his cell from approximately 8:30 p.m. of April 24 until approximately 11:00 a.m. on April 25.

Sergeant Stacey, the lie detector expert, testified that he met with Blackburn at 10:50 a.m. on April 25 and that he told Blackburn that he wanted to ask him some questions in connection with the robbery and murder and that Blackburn had the right to refuse to answer any and all questions. Sergeant Stacey further testified that Blackburn never complained to him and did not ask him for a lawyer. Blackburn testified on the question of voluntariness of his confession after hearing the above testimony of Sergeant Stacey and never disputed this specific testimony of Sergeant Stacey.

After lunch Blackburn was given the lie detector test. Blackburn's version of how Sergeant Stacey conducted the lie detector test was completely denied by Sergeant Stacey

and other police witnesses. Stacey testified, and Blackburn confirms, that Blackburn made a request to confront Mefford and to see his wife, and both requests were granted immediately after Blackburn was returned to his cell and given supper. When Blackburn was confronted by Mefford at Blackburn's request, Mefford's statement was read to Blackburn (apparently in part by Mefford himself) and Blackburn then indicated that he was ready to talk.

Blackburn's wife was then brought to see him at his request, and the police remained at the entrance to the room only at the request of Blackburn's wife. While talking to his wife Blackburn knew that the officers were standing in the doorway but still made certain incriminating statements to his wife. After talking with his wife, Blackburn made a verbal statement to several policemen in the presence of his wife, in which he admitted being with Mefford in a 1955 red Chevrolet on the night in question and that they had looked over another service station which had too much activity and then proceeded to the station at which the robbery and murder took place. After the oral statement, Blackburn was questioned by the police and the questions and answers were taken down by a police stenographer. After the stenographer's notes had been transcribed, Blackburn signed the written confession and immediately thereafter warrants were obtained charging Blackburn with robbery and murder.

Five police officers testified on the question of voluntariness of the confession, and all five denied using any force, threats, promises, or inducements.

After hearing all the testimony with regard to the voluntariness of the confession, the two trial judges who heard the case without a jury found that the statement "was freely and voluntarily given, without any threats, promises of reward, duress, force, or violence" and found further:

". . . nothing unusual done by either the State Police or the Baltimore County Police to get a confession from this defendant. The testimony of all involved, except the defendant, are that he was fed, that he was granted the two requests, one, to be confronted by Mefford, and to see his wife. At no time was he asking for counsel, which was corroborated by Blackburn, who said if you've got anything on me, book me, and I'll get counsel. . . ."

The Court of Appeals of Maryland confirmed this finding by the triers of fact and stated:

"The combination of Mefford's accusation of Blackburn and his wife's inability or unwillingness to support his alibi apparently were the blows that persuaded him that he might as well confess, rather than any improper or unlawful techniques of the police, subtle or direct.

"We find that the trial judges permissibly could, as they did, both preliminarily in passing on admissibility and then as the triers of fact, find Blackburn's confession to have been in fact voluntary and not the result of an overborne will, not the product of either police stick or carrot."

Judge Kaufman in the District Court, although accepting the State court findings on physical facts as supported by the record as a whole (300 F. Supp. at 1139), found to the contrary that the confession was given involuntarily and admitted into evidence at Blackburn's trial in violation of the due process clause of the Fourteenth Amendment, stating:

"Had Blackburn been taken before a magistrate as required by Maryland law, or had his repeated expressions of desire for booking and a lawyer been granted, then he would have received the legal help he needed. But the police ignored both Blackburn's repeatedly expressed wish for booking and counsel and their explicit duty to take him before a judicial officer.

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"Given the impact of these three factors acting in concert — the illegal detention; Blackburn's repeated desire for booking and counsel; and the felony-murder doctrine and its use or misuse by the interrogators — this Court concludes that, under the totality of the circumstances, Blackburn's incriminating statements were not the product of his free and rational choice, and were given involuntarily, and that their admission into evidence at Blackburn's trial violated the due process clause of the Fourteenth Amendment. Blackburn's petition for writ of habeas corpus is therefore granted."

The Fourth Circuit Court of Appeals affirmed. Appendix A, pages 1a to 2a.

REASONS FOR GRANTING THE WRIT

The conclusion of the District Court Judge that, under the totality of the circumstances, Blackburn's incriminating statements were not the product of his free will and rational choice, and were given involuntarily, and that their admission to evidence at Blackburn's trial violated the due process clause of the Fourteenth Amendment, was improper and the petition for writ of habeas corpus should have been denied.

The question of whether Blackburn's confession was voluntary or not has been at issue from the inception of his trial in July of 1962. Then the trial court made a finding of voluntariness and admitted confession into evidence against him. On direct appeal, the Maryland Court of Appeals found "no unfairness in the totality of the circumstances attendant upon the making of . . . the confession of Blackburn, and are persuaded that there was no unfairness or legal or constitutional error . . . in the admission against Blackburn of his confession." 235 Md. 497. Blackburn petitioned the Supreme Court to review the af-

firmation of the judgment by the Maryland Court of Appeals in Blackburn's case by way of certiorari, raising the identical issues raised at trial and on direct appeal. Certiorari was denied.

Blackburn in the proceeding below sought federal habeas corpus relief, contending again that his conviction cannot stand because the confession used against him at trial was unconstitutionally obtained, asking the District Court to find to the contrary whence he had thrice been denied. There, Blackburn's challenge focused on six elements: (1) the physical treatment of Blackburn; (2) the advice, or lack of advice, given with respect to Blackburn's constitutional rights; (3) the coercive circumstances of Blackburn's meetings with his wife and with his co-defendant, Mefford; (4) detention during a period when he was legally denied due process of law; (5) obtention of Blackburn's confession in violation of his right to counsel; and (6) the use or misuse by Blackburn's interrogators of the felony-murder doctrine. All of these factors are dealt with by the District Judge Kaufman in his Opinion. Judge Kaufman accepts the State court findings on the physical facts as being supported by the record as a whole (300 F. Supp. at 1139), and further recognized that the great portion of disputed testimony in the record concerns that physical treatment (300 F. Supp. at 1138).

Considering the impact of three factors "acting in concert — the illegal detention; Blackburn's repeated desire for booking and counsel; and the felony-murder doctrine and its use or misuse by the interrogators — this court [i.e., the District Court below] concludes that, under the totality of the circumstances, Blackburn's incriminating statements . . . were given involuntarily. . . ." These objective factors led the District Court to the question of whether Blackburn's confession was coerced by psycho-

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logical pressures. Each of these remaining elements is given extensive individual consideration by Judge Kaufman. He ultimately determined that they, acting in concert, evidenced that Blackburn's confession was the product of an overborne will. Dealing with each of these alleged improper actions by the police, it becomes evident that none of them, when viewed either individually or in concert, significantly substantiates the conclusion of the District Court. Your Petitioner believes that the standards thus imposed by Judge Kaufman were clearly erroneous and improper and that the prior findings by the Maryland Court of Appeals were correct, and that the conviction of Blackburn should therefore stand.

The factor of illegal detention, as assessed by Judge Kaufman, is that Blackburn was held in police custody and interrogated for nearly two days without being brought before a judicial officer. This, Judge Kaufman concludes, is contrary to the explicit law of Maryland, with reference to *Clewis v. Texas*, 386 U.S. 707 (1967); *Davis v. North Carolina*, 384 U.S. 737 (1966); and *Collins v. Beto*, 348 F. 2d 823, 834 (5th Cir., 1965) (concurring Opinion of Friendly, J., sitting by designation). Although Judge Kaufman finds it an important factor, he recognizes the rule under *Mallory v. United States*, 354 U.S. 449 (1957); and *McNabb v. United States*, 318 U.S. 332 (1943), has not been held to apply to criminal prosecution in state courts. *Clewis v. Texas, supra*, at 711, n. 7; *United States v. Schwartz*, 372 F. 2d 678 (4th Cir., 1967); *Jacobs v. Warden*, 367 F. 2d 321, 323 and n. 2 (4th Cir., 1966); *Ralph v. Pepersack*, 335 F. 2d 128, 136, n. 11 (4th Cir., 1964), *cert. den.*, 380 U.S. 925 (1965); *cf. Outing v. North Carolina*, 383 F. 2d 892 (1967), *cert. den.*, 390 U.S. 997 (1968).

In *Culombe v. Connecticut*, 367 U.S. 568 (1964), this Court set forth its reasons for not requiring the State

courts blindly to apply the *McNabb-Mallory* Rule and instead for allowing the States to determine whether or not the period of detention together with all the other surrounding circumstances made the confession involuntary. This Court has consistently upheld state convictions even in situations where the police have violated a state statute such as the one in Maryland which requires that an accused be taken before a magistrate as soon as possible. The Maryland Courts, as evidenced by the decision of the Court of Appeals of Maryland in this case (*Mefford and Blackburn v. State, supra*), have always recognized that an accused should be taken before a magistrate as quickly as possible, but have never held that a confession cannot be used merely because there may have been some delay in taking the accused before a magistrate. The Court of Appeals of Maryland requires that any such delay be considered in connection with all other factors in determining whether or not the confession was voluntary. The triers of fact and the Court of Appeals of Maryland determined that such delay as there was in this case did not enable the police to obtain a confession against the will of Blackburn.

In addition, as previously indicated, the facts show that there was no unreasonable delay in charging Blackburn in this case. The facts which justify an arrest on probable cause to believe that a felony has been committed by the accused may not in all instances be sufficient for a preliminary hearing. In a situation where the accomplice had named Blackburn as a participant and the accomplice's story had been checked by the police, there was sufficient cause to arrest, but if the accomplice refused to testify at a preliminary hearing, the police would not have had sufficient evidence to charge Blackburn. The police, therefore, had every reason to question Blackburn in order to have him either affirm or deny the allegations made by the

accomplice. In all cases this enables the accused to present his side of the story before he is charged. There is no doubt that this questioning must be held within proper limits and the rights of the accused must be protected. The triers of fact and the Court of Appeals of Maryland fully considered all the testimony, including that with regard to the length of the detention and the time when Blackburn was actually charged, and determined that the interrogation was held within proper limits and that the constitutional rights of Blackburn had not been invaded.

The crux of Judge Kaufman's reliance on the factor of delay in the preliminary hearing is the assumption that had Blackburn been taken before a judicial officer and charged with murder, he "certainly would have been warned of the jeopardy that he was in; and he would either have been afforded free counsel or he immediately would have been allowed to communicate with a retained lawyer." This assumption is entirely incorrect. It was extremely rare in 1962 that a defendant appear in a preliminary hearing represented by counsel. It may be fairly stated that virtually never was counsel appointed for such hearings. On several occasions this Court has had the question before it of whether in Maryland the accused is constitutionally entitled to be represented by counsel at a preliminary hearing. In the absence of a guilty plea or other unusual circumstances, a preliminary hearing in Maryland is not a "critical stage" in the judicial proceedings requiring the appointment of counsel. *DeToro v. Pepersack*, 332 F. 2d 341 (4th Cir., 1964), *cert. den.*, 379 U.S. 909 (1964). *Cf. White v. Maryland*, 373 U.S. 59 (1963). Furthermore, it is incongruous to suggest that Blackburn could communicate with retained counsel, for it was necessary to appoint counsel to represent him at his trial. Under the circumstances, the delay or absence of a preliminary hearing can-

not be said to be a significant factor in the totality of circumstances attendant to the obtaining of Blackburn's confession.

Judge Kaufman next turns to what he concludes is a repeated express desire for legal help by Blackburn. 300 F. Supp. at 1142. The basis for this conclusion is that Blackburn on several occasions told the police that if they had anything on him, to book him and charge him and let him get a lawyer. Judge Kaufman concedes that these repeated statements of Blackburn's may well, on their face, not amount to a specific request for counsel, comparing *Frazier v. Cupp*, 394 U.S. 731 (1969), and referring also to the conclusion of the Court of Appeals of Maryland, 235 Md. at 513. Proceeding, Judge Kaufman relies upon *Greenwald v. Wisconsin*, 390 U.S. 519 (1968), wherein the Supreme Court held that "the lack of counsel, especially in view of the accused's statement that he desires counsel," is relevant to the issue of voluntariness. The Appellee recognizes this rule of law, but it is debatable whether, as Judge Kaufman concludes, Blackburn's desire for counsel is expressed in clearer terms than Greenwald's. Greenwald responded to police request to write out a confession by "stating that it 'was against my constitutional rights' and that he was 'entitled to have a lawyer.' " 390 U.S. at 520. It is submitted that Blackburn's request to be booked and let him get a lawyer is not as strong an expression of desire for counsel as a statement that he is entitled to a lawyer in an attempt to refuse to write a confession, particularly in view of the fact that the trial judges could have concluded that his requests to be immediately charged were all made *before* Blackburn agreed to take a lie detector test under conditions set by him. (See 235 Md. at 513.) Also, it should be noted that Blackburn was not held incommunicado, his wife having been informed where he

was when the police went to retrieve his clothes and also that he was allowed to see his wife at his request. In light of these circumstances, it is urged that Blackburn's "request" for counsel is more in the context of the request in *Frazier v. Cupp, supra*, wherein the Supreme Court held: "In this context, we cannot find the denial of the right to counsel which was so crucial in *Escobedo*." Hence the unheeded request to be booked and to let him get a lawyer (not, as Judge Kaufman states, permitted to consult with a lawyer; see 300 F. Supp. at 1143) are not factors which should be given great weight in determining whether his confession was voluntary.

Finally, Judge Kaufman turns to what he terms the felony-murder situation. It is his conclusion that because of the felony-murder rule and that an admission by Blackburn that he participated in the robbery would be enough to convict him of the murder, the use or misuse of this rule by the police was a factor which tended to induce Blackburn to confess. Judge Kaufman finds there is no evidence that Blackburn knew the felony-murder rule. Similarly, it can be stated there is no evidence that the police used this rule, by ruse or other manner, to obtain the confession to the robbery alone. Obviously, they were seeking the "truth" of what occurred. Judge Kaufman implies that the police, in their effort to solve the robbery, used as an inducement the suggestion that Blackburn should deny the actual shooting, but to the contrary it can be stated that the police actually believed that Blackburn did not do the shooting. Though it is true that the co-defendant, Mefford, in his confession to the police had put the gun in Blackburn's hands, the motive for the killing was the fact that the gas station attendant knew Mefford, and therefore it appeared to the police that Mefford was just trying to save his own neck. All the evidence in this regard, which Judge

Kaufman relates in his decision, 300 F. Supp. at 1143, are really legitimate claims set forth in the testimony of Blackburn that Mefford, by "fingering" Blackburn, was making a bid for his life, and that he (Blackburn), in turn, was doing the same. In any event, the application of a misuse of the felony-murder rule under the circumstances here is highly improbable. What in fact happened was that Blackburn was confronted with the accusation by his co-defendant that he had done the actual killing and that this factor, coupled with the realization that his wife was not going to provide him with a reliable alibi, was what brought about a decision on his behalf to give a confession to the police.

While concededly, as Judge Kaufman concludes from the above factors, that lawyer's advice to Blackburn would have been useful to him (for assuredly a lawyer would have advised him to remain silent), this pre-*Escobedo* case does not demand the rigid standards of right of counsel that are existent today. Under the standards in existence in 1962, it is clear that the factors that Judge Kaufman finds relevant did not amount to a deprivation of counsel, and furthermore it cannot truly be said that these circumstances brought about psychological pressures which induced Blackburn to confess. It is therefore submitted that the conclusion of the Maryland Court of Appeals that Blackburn's confession was, in fact, voluntary and not the result of an overborne will, is correct. Reiterating, the "combination of Mefford's accusation of Blackburn and his wife's inability or unwillingness to support his alibi apparently were the blows that persuaded him that he might as well confess rather than any improper or unlawful tactics of the police, subtle or direct." 235 Md. at 511.

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CONCLUSION

For the reasons set forth above, it is apparent that the decision by this Court to grant the Writ of Certiorari to review this case would enable this Court to resolve the direct conflict between the findings of the Maryland courts and the findings of the United States District Court for the District of Maryland, as affirmed by the Fourth Circuit Court of Appeals. It would also enable this Court to correct the obviously improper and erroneous application of the law that has been decided by the many decisions of this Court. Therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
ALFRED J. O'FERRALL, III,
Assistant Attorney General
of Maryland,
Counsel for Petitioner.

APPENDIX

United States Court of Appeals
For The Fourth Circuit

No. 13,723

Earl Leroy Blackburn,

Appellee,

v.

Roger B. Copinger, Warden,
Maryland State Penitentiary,

Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore

(Frank A. Kaufman, District Judge)

(Argued February 6, 1970. Decided February 20, 1970.)

Before Sobeloff, Bryan and Butzner, Circuit Judges.

Alfred J. O'Ferrall, III, Assistant Attorney General of Maryland, (Francis B. Burch, Attorney General of Maryland, and Edward F. Borgerding, Assistant Attorney General, on brief) for Appellant, and Larry P. Scriggins (Court-assigned counsel) and George A. Nilson for Appellee.

Per Curiam:

The charges upon which Earl Leroy Blackburn was tried in the Maryland state court grew out of an armed robbery which resulted in the victim's death. He was convicted of first degree murder, robbery and armed robbery, but was acquitted of an assault charge. The murder conviction, for which Blackburn was sentenced to death, was founded upon the felony-murder rule, which attaches equal liability to the actual killer and anyone participating in the robbery. The sole evidence implicating Blackburn in the crime was his confession.

After full but unsuccessful litigation in the state courts on the voluntariness of his confession,[1] Blackburn petitioned for a writ of habeas corpus in the District Court. Upon consideration of the entire record and the stipulation of facts entered into by counsel for petitioner and the state, District Judge Kaufman concluded that under the circumstances, Blackburn's confession was the product of an overborne will. Specifically, the Judge's opinion adverted to and assessed the psychological effect of (1) the long period of illegal detention during which petitioner was not fully warned of the jeopardy he was in; (2) the failure of the police to heed petitioner's repeated manifestations of a desire for an attorney; and (3) the exploitation by the police of the felony-murder situation in inducing Blackburn to implicate himself in the robbery by leading him to believe that in that way, and in only that way, could he clear himself of the murder charge that had been leveled at him.[2]

For the reasons cogently stated by Judge Kaufman in his opinion, at ..... F. Supp. ..... (D. Md. 1969), the order granting the writ of habeas corpus is hereby

Affirmed.

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[1] Petitioner was tried before the dates of decision in Escobedo v. Illinois, 370 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966). Thus under the rule of Johnson v. New Jersey, 384 U.S. 719 (1966), the scope of the inquiry with respect to Blackburn's confession has been limited to whether it was involuntarily given.

[2] The District Judge also noted the presence of various other factors that could have had an impact on Blackburn: physical weakness and pain; lack of advice with respect to constitutional rights; confrontations with the alleged co-conspirator, Mefford, and with Blackburn's wife. The Judge did not accord these factors independent significance but took them into account in surveying the totality of the circumstances.